No. 89-1712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NORTHWEST FOOD PROCESSORS ASSOCIATION, a nonprofit association, *et al.*,

Petitioners,

v.

WILLIAM K. REILLY, Administrator, United States Environmental Protection Agency,

and

NORTHWEST COALITION AGAINST PESTICIDES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NCAP RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether *users* of the pesticide dinoseb can prevent the Environmental Protection Agency ("EPA") from issuing a final cancellation order forbidding further sale or use of dinoseb, and force the Agency to conduct a costly risk benefit analysis, when all dinoseb *registrants* have agreed to the cancellation of the pesticide?

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I. STATEMENT OF THE CASE

This case raises the issue of whether dinoseb *users* can prevent the EPA from issuing a final cancellation order forbidding further sale or use of dinoseb, and force the Agency to conduct a costly risk benefit analysis, when all *registrants* have agreed to the cancellation of their registrations. The EPA concluded that the Federal Insecticide, Fungicide and Rodenticide Act

("FIFRA"), 7 U.S.C. §§ 136-136y (1988), gives pesticide users the right to defend a pesticide registration only when they act "with the consent of registrants or with respect to a commodity actually being produced for some purposes." *Cedar Chemical Co.*, FIFRA Docket No. 590, EPA Final Decision ("Final Dec."), Appendix A164[1] (quoting *McGill v. EPA*, 593 F.2d 631, 637 (5th Cir. 1979)). Both appellate courts that have addressed this issue have upheld the EPA's interpretation of the statute. *See Northwest Food Processors Association v. Reilly*, 886 F.2d 1075 (9th Cir. 1989), Appendix A4; *McGill*, 593 F.2d at 637. Since petitioners admittedly meet neither statutory criterion, the EPA properly concluded that petitioners can neither prevent the cancellation of the remaining dinoseb registrations nor require any further risk assessment. Final Dec., Appendix A161, A165.

The risk benefit analysis petitioners seek could only be made in an evidentiary hearing. *See* 5 U.S.C. §§ 554, 556(d)-(e) (1988); 7 U.S.C. § 136d(b)-(d) (1988). Yet, even petitioners now admit that they have no right to "force further proceedings." Petition for Writ of Certiorari ("Petition") at 13. Thus, the EPA and the Ninth Circuit correctly concluded that "[t]he decisions of the two [remaining] registrants to have EPA cancel their product registrations makes weighing the risks of continued dinoseb use against its benefits legally irrelevant." Final Dec., Appendix A165; *see Northwest Food Processors*, 886 F.2d at 1079, Ap-

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[1] Citations to "Appendix A ___ " are to the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed in Northwest Food Processors Association v. Reilly, No. 89-1712.

pendix A18-19. Interpreting FIFRA § 6(b), 7 U.S.C. § 136d(b), the EPA reasonably concluded that under these circumstances pesticide users cannot force the EPA to conduct a costly risk benefit analysis because Congress did not intend "*sub silentio* to tax the fisc with this kind of expense." Final Dec., Appendix A165 (quoting *McGill*, 593 F.2d at 637).

Since no one retains a license to sell or manufacture dinoseb, the petitioners lack Article III standing to press their claim. Where, as here, no relief a court can give would redress the harm petitioners claim they have suffered—or put dinoseb back on the market—the Constitution precludes this Court from entertaining such a hypothetical dispute.

A. STATEMENT OF FACTS

Dinoseb is an herbicide, insecticide, fungicide and desiccant, which was registered for use in the United States until June 9, 1988. On that date the EPA Administrator approved a settlement with the last two registrants cancelling all remaining dinoseb registrations. In the Pacific Northwest, dinoseb was primarily used by growers of dry peas, cucurbits, lentils, chickpeas, green peas, snap beans, blackberries, boysenberries, loganberries and raspberries. Dinoseb has not been sold or used in the United States since 1989. Nor have petitioners or anyone else sought to reregister the pesticide.

On October 7, 1986, the EPA initiated efforts to ban dinoseb from the marketplace when it determined that even a single exposure to a minute quantity of the pesticide could cause birth defects, male sterility, or other adverse health and environmental effects. *See* 51 Fed. Reg. 36,634 (1986). The Agency also found

that dinoseb is "highly acutely toxic to humans by all routes of exposure," and that it has proven fatal in at least one accident in recent years. *See id.* at 36,637. In addition to the threat to human health, the EPA found that dinoseb threatens "the continued existence of more than 30 endangered species" and that dinoseb is "acutely toxic" to many non-target mammals, birds, and aquatic animals. *See id.* at 36,655.

The Administrator expressed greatest concern about the teratogenic risks posed by dinoseb use. In particular he noted that:

> [B]irth defects may be induced by dinoseb exposures which cause no other apparent adverse effects. Since a substantial number of people report acute reactions to dinoseb exposure every year, it is reasonable to infer that a significantly greater number of people are exposed to dinoseb concentrations which may pose a developmental hazard. Moreover, Agency scientists believe that irreversible damage to the fetus may result from a single exposure of a pregnant female at a time when she may not yet be aware that she is pregnant.

Id. at 36,636.

The EPA recognizes that "a [margin of safety] MOS[2] greater than or equal to 100 is generally nec-

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[2] The margin of safety, or "MOS", is a ratio which provides an indicator of the danger of injury in the event of exposure to a particular toxicant. The numerator is the "No Observed Effect Level," or "NOEL." The NOEL is the highest level of exposure of the toxicant at which laboratory animals show no

essary to provide an acceptable level of protection from developmental toxicity effects for a pesticide." *Id.* at 36,642-43. In calculating the exposure component of the MOS for dinoseb, the EPA presumed compliance with label and protective clothing requirements, even though surveys showed that actual compliance was often lacking. *See id.* at 36,640. Nonetheless, the EPA found *no* adequate margins of safety for the tens of thousands of workers and their families facing exposure to dinoseb. Thus, the EPA concluded that:

> [V]irtually all workers directly involved in the application of dinoseb products have an inadequate margin-of-safety between their estimated exposure and the highest dose at which no teratogenic effects have been observed in animals. *A substantial portion of all application workers have literally no margin-of-safety at all.* Indeed, the exposure estimates for some workers approach or exceed the dose which actually caused birth defects in animals.

Id. at 36,635 (emphasis added). The EPA's assessment of the risks to women of child-bearing age was most alarming: the EPA found an inadequate margin of safety for *all* women of child-bearing age who handle dinoseb, even assuming they wore the required protective clothing, used state-of-the-art farm equipment, and used dinoseb only once per season. *See id.* at 36,643.

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reaction. The denominator is the estimated exposure level in humans. Both figures are expressed in mg/kg/day. Thus, for example, if the NOEL is 1 mg/kg/day, and the estimated human exposure level is .01 mg/kg/day, the MOS is 100.

The EPA also examined possible risk reduction measures which might be implemented to permit some continued use. *See id.* at 36,647-48. It considered the use of additional protective clothing and farm equipment, lower application rates, and gender-based restrictions, but found all these measures to be inadequate. The agency noted that protective clothing was already required, and that additional requirements were "impractical and difficult to enforce," and in some cases, could actually increase the risk. *Id.* at 36,647. The use of protective farm equipment improved the margin of safety too little to provide sufficient protection against the risk of developmental toxicity. *See id.* Likewise, the use of gender-based restrictions was found to be inadequate because women could misunderstand or ignore the warnings, *see id.* at 36,648, and such restrictions would not protect pregnant women from exposure to dinoseb through spray drift or contaminated clothing or equipment.

After the EPA issued its notice of intent to cancel, the dinoseb manufacturers commissioned additional studies of the risks of dinoseb use. *See Cedar Chemical Co.*, FIFRA Docket No. 590, Administrative Record ("AR") 121, App. C at 2 (EPA Rationale for Settlement). Those studies showed that the EPA had *underestimated* the risks associated with dinoseb exposure.[3] They found that the no-observed-effect-level

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[3] The studies also suggested that dermal absorption of the alkanolamine salt formulation of dinoseb, used on pea crops, is lower than EPA believed. *See* AR 121, App. C at 3 (Rationale for Settlement). Even if this finding were correct, which the EPA has questioned, *see* AR 154 at 22-24 (EPA Reply to AFFI Exceptions), it would not apply to the more potent phenol for-

(NOEL) for dermal exposure, the most common route of exposure, is less than 1 mg/kg/day—not the 3 mg/kg/day on which EPA had based its 1986 risk assessment. *See* AR 154, Attachment D at 1 (EPA, Dermal Developmental Toxicity Studies, June 26, 1987). Indeed, the tests failed to establish any "no effect level" or NOEL. *See id.* at 21 (EPA Reply to AFFI Exceptions).

The tests conducted by the dinoseb registrants also highlighted the risks of accidental exposure. In one test an applicator who made a "mistake" received a dose of 63.909 mg/kg/day of the pesticide, which far exceeds the lowest level at which birth defects occur in test animals. This applicator received an injurious dosage even though he used a closed loading system, wore chemical-resistant boots, a NIOSH-approved respirator, a hat, a face shield and an apron. *See* Orius Associates Report at 8-9. Nor was this accident a freak occurrence. Based on "incident reports," the EPA noted "that events which would result in exposures of *this magnitude do occur regularly and are unavoidable.*" AR 154 at 24 (EPA Reply to AFFI Exceptions) (emphasis added).

B. STATUTORY FRAMEWORK

Under FIFRA, a pesticide may not be sold or distributed in the United States unless it is registered with the EPA. *See id.* at § 136a(a). A pesticide can only be "registered" if it, *inter alia*, "will perform its intended function without unreasonable adverse effects on the environment . . . when used in accord-

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mulation, which is used on caneberries. *See* AR 121, App. C at 14 (Rationale for Settlement).

ance with widespread and commonly recognized practice . . . . " *Id.* at § 136a(c)(5).[4] The registrant at all times bears the ultimate burden of proving that the pesticide meets the requirements for registration under the Act. *See Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1010 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 1112 (1981).

The EPA Administrator must cancel a pesticide registration after five years or any subsequent five-year period unless the "registrant or [an] interested person *with the concurrence of the registrant*" requests that the registration be continued. 7 U.S.C. § 136d(a)(1) (1988) (emphasis added).

The Administrator may also give notice of his intent to cancel the registration of a pesticide before any five-year period expires "[i]f it appears . . . that a pesticide . . . when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment. . . . " *Id.* at § 136d(b). If no adversely affected person requests a hearing within thirty days of the publication of such a notice, "the proposed action shall become final . . . . " *Id.* at § 136d(b).

If a cancellation hearing is held, the Administrator must consider restricting a pesticide's use or uses as an alternative to cancellation and explain fully the reasons for these restrictions. *See id.* The Administrator's decision is final, and may be reviewed only

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[4] FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* at § 136(bb).

by a court of appeals. *See id.* at §§ 136d(b), 136n(b).

If a pesticide registration is cancelled, the Administrator "may permit the continued sale and use of existing stocks of a pesticide . . . to such extent, under such conditions and for such uses as he may specify if he determines that such sale or use is not inconsistent with the purposes of this subchapter and will not have unreasonable adverse effects on the environment." *Id.* at § 136d(a)(1).

C. EPA CANCELLATION PROCEEDINGS

In response to the EPA's notice of intent to cancel all dinoseb registrations, only six of over 300 registrants filed timely hearing requests to contest the EPA's action. As a consequence, in November 1986, the Administrator cancelled, by operation of law, all but those six dinoseb registrations. *See id.* at § 136d(b). Four of the remaining registrants subsequently withdrew their requests for a hearing, *see* AR 68, 105, 114, thereby allowing their dinoseb registrations to be cancelled as well. *See id.* American Frozen Food Institute ("AFFI") was the only petitioner in this case to intervene in the cancellation hearing requested by the two remaining registrants Drexel Chemical Corporation ("Drexel") and Cedar Chemical Company ("Cedar").[5]

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[5] Before the 1987 growing season, Oregon and Washington users of dinoseb (including some of the petitioners) challenged the EPA's 1986 emergency suspension of dinoseb. The Ninth Circuit enjoined the suspension order on the grounds that the EPA had not given sufficient consideration to the economic costs of suspension. *See* Love v. Thomas, 858 F.2d 1347 (9th Cir. 1988), *cert denied*, 109 S. Ct. 1932 (1989). Contrary to petitioners' assertion, however, the court did not question the scientific merit

On January 13, 1988, the EPA and Cedar and Drexel, entered into an agreement which provided for the final cancellation of all remaining dinoseb registrations, while permitting limited use of existing stocks.[6] *See* AR 121 (Joint Motion for Accelerated Decision, filed January 13, 1988). Although the EPA found that alternative pesticides existed for all crops except caneberries,[7] it allowed limited dinoseb use on selected crops in the Pacific Northwest, to minimize the economic impact on growers of the loss of dinoseb and to ease their transition to new alternatives. *See* AR 121 at 6-17 (EPA Rationale For Settlement). The existing stocks provisions expired in 1989 and growers have now gone through at least one season for all crops without the use of dinoseb.[8]

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of the EPA's conclusions regarding the health risks from exposure to the pesticide. *See id.* at 1358. Moreover, the court left it open for the Agency to conclude on remand that an immediate suspension of dinoseb use was "justified by the health risks to applicators and other farmworkers." *Id.* at 1361.

[6] Contrary to the petitioners' assertion, the EPA did not buy "out the manufacturers by offering to permit sales of existing stocks in exchange for cancellation," Petition at 19, since the registrants were already entitled to indemnification for their canceled products under the statute then in effect. *See* FIFRA § 15, Pub. L. No. 92-516, 1972 U.S. Code Cong. & Adm. News (86 Stat.) 1163-64 (codified as 7 U.S.C. §136m and superseded by Section 501(a), Pub. L. No. 100-532, 1988 U.S. Code Cong. & Adm. New (102 Stat.) 2674-77).

[7] Petitioners' claim that "there are no known effective alternatives to dinoseb," Petition at 6, is flatly wrong.

[8] Despite the petitioners' dire predictions, "Skagit County pea farmers achieved nearly the same pea yields last year as in previous years, before they lost the popular herbicide dinoseb." *Scientists Helped Growers Succeed Without Dinoseb*, Skagit Valley Herald, Feb. 7, 1990.

In approving the settlement over AFFI's objections, the EPA Administrator ruled that dinoseb users had no right to a formal evidentiary hearing on cancellation. Final Dec., Appendix A161. In so ruling, the Administrator adopted the reasoning of the Fifth Circuit in *McGill*, 593 F.2d at 637, that nonregistrants could only request a cancellation hearing if they "act with the consent of the registrants or with respect to a commodity actually being produced for [some] purposes," neither of which applied here. *See* Final Dec., Appendix A164 (quoting *McGill*, 593 F.2d at 637). Since all of the registrants had agreed to the cancellation of their registrations, the notice of intent to cancel became moot and the EPA Administrator had no occasion to "weigh[ ] the risks of continued dinoseb use against its benefits . . . . " Final Dec., Appendix A165.

D. THE LITIGATION BELOW

On June 10, 1988, the dinoseb users filed this action, challenging the EPA's final cancellation order. A number of farmworkers and labor and environmental groups (NCAP Respondents or "NCAP")[9] intervened on August 10, 1988. NCAP agreed with the EPA's decision to cancel dinoseb's remaining registrations, but challenged the decision to allow any continued use of existing stocks.

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[9] The NCAP Respondents are David Alvarez, Alicia Prieto, Cristina Esquivel, National Coalition Against Misuse of Pesticides, Northwest Coalition Against Pesticides, Natural Resources Defense Council, United Farmworkers of Washington State, and Pineros y Campesinos Unidos Del Noroeste, Inc. None of the NCAP Respondents have parent companies or subsidiaries.

Although the district court initially granted a preliminary injunction, enjoining the settlement, *see Northwest Food Processors Association v. Thomas*, No. 88-641 (D. Ore. June 17, 1988), Appendix A109, it later reversed itself and upheld the settlement in its entirety. *See Northwest Food Processors Association v. Thomas*, No. 88-641 (D. Ore. Oct. 4, 1988), Appendix A29.[10] In upholding the cancellation order, the district court agreed with the EPA that: 1) only the appellate court had jurisdiction over the petitioners' claims since they had been given a "hearing" on the legal issue of their right to an evidentiary proceeding to contest the settlement, *see id.*, Appendix A38; and 2) FIFRA afforded pesticide users no right to an evidentiary hearing when all registrants have agreed to cancellation. *See id.* Appendix A40-41.[11] The court also upheld the EPA's decision to allow limited use of existing stocks.

The Ninth Circuit affirmed the grant of summary judgment in the EPA's favor. *See Northwest Food Processors*, 886 F.2d 1075 (9th Cir. 1989), Appendix

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[10] Petitioners quote the district court's preliminary injunction order, Petition at 11, without mentioning that the lower court explicitly found that those findings were "in many respects inconsistent with" its ruling on summary judgment, and caused by "the need to rule hurriedly on issues arising out of the interpretation of a complex statute." *Northwest Food Processors*, No. 89-641 (D. Ore. Oct. 4, 1988), Appendix A34.

[11] The district court ruled that the pesticide users had statutory standing to bring their challenge under 40 C.F.R. § 164.121(e)(3) (1989), as "adversely affected" persons, who had moved to intervene, *Northwest Food Processors*, No. 88-641 (D. Ore. Oct. 4, 1988), Appendix A39-40, but the court failed to address NCAP's challenge to petitioners' standing on constitutional grounds.

A4. It too concluded that jurisdiction over petitioners' claim lies only in the appellate court, *see id.* at 1078, Appendix A14,[12] and that the EPA's adoption of the *McGill* analysis was consistent with FIFRA and its 1988 amendments. *See id.* at 1079, Appendix A18-19. Finally, the court affirmed the existing stocks provision. *See id.* at 1079-80, Appendix A19-23.

II. REASONS WHY CERTIORARI SHOULD BE DENIED

A. THE DECISIONS OF THE EPA AND THE NINTH CIRCUIT HERE ARE CONSISTENT WITH THE STATUTE AND DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER APPELLATE COURT

The petitioners now admit that the EPA and the Ninth Circuit were correct in following *McGill*, 593 F.2d at 636-37, and ruling that the petitioners were *not* entitled to an evidentiary hearing to contest the cancellation of dinoseb registrations. Petition at 13. In addition, petitioners concede that they cannot challenge the right of the EPA "to achieve the cancellation of a pesticide by means of settling with the manufacturers." *Id.* Nonetheless, in their petition to this Court they seek to contrive a new route to an evidentiary hearing, by claiming that FIFRA requires the EPA to undertake a risk benefit analysis before it issues *any* final cancellation order. *See id.*[13] Their

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[12] Consequently, it determined that only AFFI was a party to the petition for review, and dismissed all other petitioners from that part of the proceeding. *See id.* at 1077, Appendix A11.

[13] Petitioners nowhere explain why they did not challenge the voluntary cancellation of approximately 300 other dinoseb registrations, which became final when those registrants failed to file a request for hearing within thirty days of the EPA's issuance of its notice of intent to cancel. *See* 7 U.S.C. § 136d(b) (1988).

distorted interpretation of the statutory language was properly rejected by the EPA and the Ninth Circuit, *see* Final Dec., Appendix A165, *aff'd*, *Northwest Food Processors*, 886 F.2d at 1075, Appendix A4; and is directly contrary to the only other appellate decision on this issue, *see McGill*, 593 F.2d at 636-37.

1. The EPA's Reasonable Interpretation of FIFRA, Affirmed By Both Appellate Courts That Have Ruled on This Issue, Should Not Be Disturbed

In *McGill*, the Fifth Circuit was the first appellate court to address the rights of nonregistrant pesticide users to resist cancellation when no remaining registrant seeks to defend their products. In that case, users of the pesticide Mirex sought to prevent the remaining Mirex registrant from entering into a settlement agreement with EPA to cancel the pesticide voluntarily; they also sought to require the agency to complete the pending cancellation proceeding. After a careful analysis of the statutory structure and the legislative history of FIFRA § 6(b), 7 U.S.C. 136d(b) (1988), the court ruled that the pesticide users could not overturn the settlement agreement, because Congress only gave users the limited right to demand completion of a hearing when they act with "the consent of registrants or with respect to a commodity actually being produced for some purposes." *McGill*, 593 F.2d at 636-37. Since the users met neither test, they could not prevent the cancellation or demand the continuation of the cancellation hearing. The court reasoned:

> The general purpose of the FIFRA revisions in 1972 was to strengthen the ability of the EPA to protect the environment. Although Congress granted certain rights to non-registrants that are

> not often found in analogous statutes, it appears to have intended that users act with the consent of registrants or with respect to a commodity actually being produced for some purposes. In this case, the lengthy hearing now suspended may require only a relatively brief time to complete and the registrant may sit idly by without further expense, but if the users' position is correct, then any consumer might have caused a lengthy and expensive hearing purely on its own volition, even if the registrant and the EPA had reached a settlement agreement the day after the notice was issued. It is difficult for us to conclude that Congress intended *sub silentio* to tax the fisc with this kind of expense.

Id. at 637. The Fifth Circuit then affirmed the cancellation, based on the settlement alone, without requiring the EPA to engage in any further risk benefit analysis. The court also noted that the users were not left without a remedy, since the statute did not prevent them from seeking to become registrants themselves. *See id.*; *see also* 7 U.S.C. § 136e (1988); 40 C.F.R. § 154.40 (1989).

As the EPA Administrator observed in the present case, "*McGill* makes good sense as applied here . . . ." Final Dec., Appendix A165. Once all registrants have agreed to the cancellation of their registrations, the Administrator reasoned, "weighing the risks of continued dinoseb use against its benefits [is] legally irrelevant" because the statute does not give pesticide users the right to compel any further proceedings. *Id.* Indeed, as the Administrator pointed out, any further proceedings would be pointless since "Cedar and Drexel cannot be compelled against their will to pro-

duce and market dinoseb products." *Id.* "[A] FIFRA registration is permissive in nature . . . [and unlike] public utilities, . . . the pesticides industry does not have to obtain governmental permission to abandon a licensed activity." *Id.*

In reviewing the EPA's interpretation of the statute, the Ninth Circuit began with the well recognized principle of statutory construction that where " 'a statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute' ". *Northwest Food Processors*, 886 F.2d at 1079 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)), Appendix A18. In answering this question, "considerable weight" must be accorded to an agency's construction of the statute it is entrusted to administer and an agency's reasonable interpretation must be affirmed. *See Chevron*, 467 U.S. at 844; *Northwest Food Processors*, 886 F.2d at 1079, Appendix A18. Applying these principles, the Ninth Circuit, like the Fifth Circuit in *McGill*, affirmed the EPA's determination that FIFRA precludes a pesticide user from preventing the cancellation of a pesticide—or requiring any further risk benefit analysis—where, as here, it fails to act with the "consent of registrants or with respect to a commodity actually being produced for some purposes." Final Dec., Appendix A164 (quoting *McGill*, 593 F.2d at 637); *see also Northwest Food Processors*, 886 F.2d at 1079, Appendix 19.

Contrary to their professed adherence to *McGill*, *see* Petition at 13, petitioners here argue that the EPA cannot base its final cancellation order on its settlement with Cedar and Drexel because: 1) there

are material issues of fact in dispute, *see* Petition at 20; 2) the agency is required to enforce the statute, not a promise, *see* Petition at 22; and 3) a "contested" settlement must be based on evidence of risks and benefits, *see* Petition at 21. None of petitioners' claims has merit.

First, the only "material" facts at issue in this proceeding are that petitioners lack the consent of any dinoseb registrant and that dinoseb is no longer registered for any purpose. Since these facts are *not* in dispute, there are no material factual issues to be resolved prior to the issuance of a final order. Petitioners' purported "dispute" as to the risks and benefits associated with dinoseb use are not *material* because they have no *statutory* right to demand a hearing or prevent cancellation. *See* Final Dec., Appendix A165; *see also McGill*, 593 F.2d at 636-37.[14]

Second, because the dinoseb users have no statutory right to prevent cancellation, the EPA's issuance of a cancellation order served to enforce the statute and not merely to enforce a promise. FIFRA makes the registrant the master of its license, and affords users only limited rights to contest cancellation. Because petitioners have *no* right to defend the dinoseb registration in the circumstances presented here, and those with the right to defend those registrations declined to do so, the agency's cancellation of the re-

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[14] Petitioners also make much of their claim that the manufacturers agreement to the cancellation was "voluntary," but not "unilateral." *See* Petition at 19. There is no legal significance to this distinction. Petitioners do not dispute that the manufacturers made a business decision not to contest the cancellation of their products and the only issue here is whether dinoseb users can prevent the cancellation despite that agreement.

maining FIFRA registrations was entirely consistent with the statute.

Petitioners also cite a number of cases which hold that the governing statute limits the substantive relief a court can give when entering a consent decree, just as it limits the relief a court can grant after trial. *See* Petition at 23. These cases are beside the point, however, where as here, petitioners agree that they have no right to a hearing, and FIFRA permits the entry of a cancellation order where no affected person demands a hearing to challenge the EPA's cancellation notice. *See* 7 U.S.C. § 136d(b) (1988).

Third, the appellate court here was not presented with a "contested settlement," and thus had no duty to review the EPA's decision to determine whether the risks of dinoseb use outweigh the benefits. Petitioners' reliance on *Consolidated Gas Supply Corp. v. FERC*, 606 F.2d 323, 330 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), to support their contrary view is wholly misplaced. *See* Petition at 22. In *Consolidated Gas*, a public utility petitioned FERC for permission to increase its rates. The Commission sought to settle the matter, and reached an agreement with the utility on all issues except for one concerning the rate of return. After all parties presented argument on the contested issue, the Commission entered an order, granting the utility a lower rate of return than it requested. On appeal, the D.C. Circuit determined that the Commission's order, which was based on the "contested settlement" could only be upheld if it was supported by substantial evidence on the record as a whole. *See Consolidated Gas*, 606 F.2d at 330. The "contested settlement" in *Consolidated Gas*, however, was clearly not a settlement at

all, since it was challenged by a party with a statutory right to contest it. By contrast, the petitioners here have no statutory right—or constitutional standing—to contest the settlement agreed to by the EPA and the registrants. Thus, the settlement and final order at issue here need not be reviewed under the substantial evidence test.[15]

Finally, if petitioners were correct that they could compel the EPA to undertake a risk benefit assessment, then the Agency would have to hold a trial type hearing subject to the procedural requirements of FIFRA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, 556(d)-(c) (1988), despite the contrary rulings in *Northwest Food Processors* and *McGill*.

Any proceeding in which petitioners were permitted to contest the cancellation of dinoseb registrations would be an "adjudication" under the Administrative Procedure Act. *See* 5 U.S.C. § 551(6)-(8) (1988). Under the APA, parties to adjudications are entitled to a trial-type hearing. *See id.* at §§ 554, 556(d)-(e); *see also*

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[15] Petitioners also turn the "substantial evidence" test on its head by arguing that the "record . . . before the EPA was replete with substantial evidence that dinoseb does *not* pose an unreasonable risk to man." Petition at 21-22 (emphasis in original). But the substantial evidence test is satisfied where an *agency's* findings are supported by evidence of record, even if the record also contains evidence supporting the opposite conclusion. *See* Pierce v. Underwood, 108 S.Ct. 2541, 2550 (1988); American Textile Manufacturers' Institute, Inc. v. Donovan, 452 U.S. 490, 523 (1981) (quoting Consolo v. FMC, 383 U.S. 607, 620 (1966) as stating that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence").

7 U.S.C. § 136d(b) (1988); *St. Louis Fuel and Supply Co., Inc. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989). Thus, petitioners would be entitled to "present [their] case . . . by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d) (1988); *see also Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922, 927 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

In sum, petitioners' claim that EPA must undertake a risk benefit analysis is nothing but a subterfuge to obtain a trial-type hearing on cancellation by another route. But FIFRA, as consistently interpreted by the EPA, the Ninth Circuit and Fifth Circuit, does *not* permit pesticide users like petitioners to compel a cancellation hearing since they do not have the consent of a registrant and the pesticide is not being produced for any other purpose. In these circumstances the EPA correctly determined that it would be a pointless waste of government resources to hold a hearing. The agency's reasonable interpretation of the statute should not be disturbed.

2. The Distorted Interpretation of FIFRA Put Forward By Petitioners Would Lead To Anomalous Results

Without quoting any specific provision of FIFRA, petitioners claim that the statute "explicitly" requires the EPA to conduct a risk assessment before issuing a final cancellation order in any "contested proceeding." *See* Petition at 12-13. In their view, the present case is such a contested proceeding.

FIFRA § 6(b)(1) sets forth the procedure by which the EPA can seek to cancel a pesticide which ad-

versely affects human health and the environment. *See* 7 U.S.C. § 136d(b)(1) (1988). Under this provision, a notice of intent to cancel may be issued, based on a preliminary weighing of risks and benefits, and cancellation will become final in thirty days, unless an evidentiary hearing is requested by an "adversely affected" person. *See id.* at 136d(b).

Section 6(b) further provides that:

> *In the event a hearing is held* pursuant to such a request . . . , a decision pertaining to registration . . . *issued after completion of such hearing* shall be final. In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation and shall fully explain the reasons for these restrictions, and shall include among those facts to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy, and he shall publish in the Federal Register an analysis of such impact.

Id. (emphasis added). The EPA reasonably interpreted this provision of FIFRA § 6(b) as requiring a risk benefit analysis *only* when an evidentiary hearing on that issue has been conducted and a record upon which such findings could be based has been compiled.

By contrast, petitioners claim that in "contested proceedings" there must be a risk benefit assessment, *even though* no hearing on that issue is required, and even though FIFRA § 6(b) makes no mention of "contested" proceedings. Petitioners have created the category of "contested proceedings" out of whole cloth,

since no such category is expressly or implicitly contained in the statute.

Moreover, petitioners' interpretation of FIFRA would lead to ludicrous results. Petitioners' interpretation would require that an evidentiary hearing be held prior to cancellation, whether it was requested or not, since such an evidentiary record is necessary to support any new factual findings. *See* 5 U.S.C. § 556(d)-(e) (1988). The interpretation also flies in the face of the well established principle that the proponent of continued registration always bears the burden of proof, *see Environmental Defense Fund*, 548 F.2d at 1004, 1012-18; 40 C.F.R. § 164.80(b) (1989), because in some circumstances no such proponent would even exist.

Thus, petitioners' interpretation of FIFRA, which has no basis in the statute, was properly rejected.

B. THIS IS NOT AN IMPORTANT CASE TO REVIEW SINCE PETITIONERS LACK STANDING TO PRESS THEIR CLAIM AND NO RELIEF THIS COURT COULD GRANT WOULD PUT DINOSEB BACK ON THE MARKET

This is not an important or proper case for this Court to review, because no relief this Court could grant would put dinoseb back on the market. In like circumstances, this Court has concluded that the litigants lack Article III standing to press their claims.

Petitioners lack constitutional standing to demand that the EPA conduct a risk benefit analysis before cancelling dinoseb registrations because *no one intends to continue manufacturing the product*. Consequently, the Court should reject petitioners' invitation to adjudicate their hypothetical claim.[16]

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[16] While plaintiffs may have had standing to challenge the

Article III's "case or controversy" provision requires potential plaintiffs to meet certain minimum standing requirements before they may proceed in any court. A plaintiff must (1) suffer an injury (2) as a result of defendant's conduct, (3) that is likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975). Petitioners cannot meet the third prong of this test.[17]

Agency's emergency suspension order in Love v. Thomas, 858 F.2d 1347 (9th Cir. 1980), when two registrants still sought to defend their dinoseb registrations, they lack standing now that the last two registrants have consented to the cancellation of their registrations. The lower courts did not address petitioners' constitutional standing, even though it was challenged by NCAP throughout these proceedings. *See, e.g.*, NCAP's Reply Brief on Cross Appeal at 12-14, in Northwest Food Processors, 886 F.2d at 1075.

[17] Nor can petitioners meet the second prong of this standard since their claimed injury—expected economic losses due to the unavailability of dinoseb—ultimately resulted from the decisions of more than 300 dinoseb registrants to accept voluntary cancellation of their registrations, not from any alleged misconduct by the EPA.

This case is similar to Smith v. Block, 784 F.2d 993 (9th Cir. 1986). In *Smith*, the Farmers Home Administration (FmHA), which held a second mortgage on plaintiffs' home, never gave the Smiths notice of certain procedural rights under the second mortgage. Nonetheless the FmHA *never* commenced foreclosure proceedings. *See id.* at 994. The Smiths sued the FmHA for the loss of their farm, claiming that FmHA erred by failing to give them notice of their rights. The Ninth Circuit held that the Smiths lacked Article III standing because they had not shown

Petitioners lack Article III standing because nothing this Court could do would remedy petitioners' alleged injury. *Warth v. Seldin*, 422 U.S. 490 (1975), illustrates this deficiency. In *Warth*, low-income residents of Rochester, New York, challenged a zoning ordinance of a nearby suburb that had the purpose and effect of excluding indigent residents. The Court assumed that the ordinance was unconstitutional, but held that the plaintiffs lacked standing to challenge it, because they failed to demonstrate that any builder would build low-income housing at prices plaintiffs could afford, even if the ordinance were struck down. *See id.* at 505. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-38 (1976) ("[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.") (citations omitted).

Sprunt & Son v. United States, 281 U.S. 249 (1929), closely parallels the present case. In *Sprunt & Son*,

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any "connection between loss of the Smiths' farm and the failure to give notice of [their] rights. [Thus t]he necessary linkage to confer standing is missing." *Id.* at 995. Similarly here, petitioners' grievance lies with dinoseb's former registrants, who have decided not to supply or register the pesticide, and not with EPA. *See also* Kerr-McGee Chemical Corp. v. United States Department of Interior, 709 F.2d 597, 602 (9th Cir. 1983) (holding that plaintiff lacked standing to challenge federal agency's advisory recommendation that state upgrade air quality standards in national monument because recommendation, in itself, did not cause any injury).

the plaintiff was a shipper who enjoyed an advantageous shipping rate. After hearings before the ICC on rate schedules, the ICC ordered the carriers to revise their rates and eliminate Sprunt & Son's competitive advantage. Both the carriers and Sprunt & Son appealed the ICC's order. During the lawsuit, however, the carriers accepted the new rates set by the ICC without objection. As a consequence, the Court held that Sprunt & Son alone, although financially injured by the new rates, lacked standing to contest them. In reaching this conclusion, Justice Brandeis reasoned that "[a] judgment in appellants' [Sprunt & Sons'] favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates. . . ." *Id.* at 258.

Even assuming *arguendo* that petitioners here were correct that the EPA failed to conduct an adequate cost benefit analysis, potential consumers of dinoseb would still not be entitled to relief in federal court because, no one is willing to sell or manufacture dinoseb. Petitioners here, like those in *Warth*, *Simon*, and *Sprunt & Son*, may have been harmed, but no relief a court can give would redress the harm petitioners claim they have suffered.[18]

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[18] Courts routinely approve settlements that have adverse effects on third parties. In Arctic Slope Regional Corp. v. FERC, 832 F.2d 158 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 175 (1988), a corporation representing potential users of the Trans-Alaska Pipeline attacked an agreement between a federal agency and the pipeline's owners as to the rates to be charged for shipping oil through the pipeline. Echoing the arguments advanced by petitioners here, the corporation argued that the agency had a

In sum, petitioners appear to be making the remarkable argument that once they have objected to the cancellation by settlement of a pesticide registration, the EPA has to engage in a risk benefit analysis before it can accept that settlement—even though no one intends to manufacture dinoseb. The EPA, with the Ninth Circuit's approval, properly concluded that neither Congress nor the Constitution requires the Agency to undertake such a useless exercise.

CONCLUSION

Since petitioners' challenge to the EPA's decision presents no split among the circuits and raises a purely hypothetical dispute, which petitioners lack standing to pursue, the petition for writ of certiorari should be denied.

Respectfully submitted,

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statutory mandate to see the hearing process through to a decision on the merits and could not escape that duty by means of a settlement. The court found no such duty explicit in the statute (the Interstate Commerce Act) and declined to supply one. Instead, referring to "the general policy favoring settlement of administrative proceedings," *id.* at 165, it refused to allow the corporation to upset the settlement. *See also* United States v. City of Jackson, 519 F.2d 1147, 1152-53 (5th Cir. 1975) (denying intervention to employees' union despite claim that inadequate back-pay provisions of consent decree between employer and the United States Justice Department impaired the union's efforts to seek remedies for its members).

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